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In the

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,
Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

HARLEY M. OGATA
Counsel of Record
Minnesota Education Association
41 Sherburne Avenue
St. Paul, Minnesota 55103
(612) 292-4830

ERIC R. MILLER
Oppenheimer Wolf & Donnelly
1700 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101-2128

Counsel for Respondents

1994 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTION PRESENTED FOR REVIEW

1. Whether a statutory scheme, triggered by political speech in the form of an independent expenditure by a citizen(s), which (1) increases the expenditure limits for a candidate by the sum of the independent expenditures made in opposition to the candidate and/or the independent expenditures made on behalf of the candidate's major political party opponents and (2) requires the payment of a public subsidy to the same candidate(s) in an amount equal to one-half of the independent expenditures, violates the citizen's rights to free speech, belief, association and equal protection guaranteed under the First and Fourteenth Amendments to the United States Constitution?

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STATEMENT OF THE CASE

Petitioners correctly state that this is a case involving a First Amendment challenge to certain statutes that relate to the making of independent expenditures. The statutes at issue provide certain candidates for office in the State of Minnesota with money subsidies and increased expenditure limits under a campaign financing scheme. These subsidies and increased expenditure limits are triggered by the making of political speech in the form of an independent expenditure of over $100 by a citizen or citizens. If eligible, candidates who are not the beneficiary of an independent expenditure receive a money subsidy equal to one-half the amount of the expenditure and have their spending limits increased dollar for dollar. There are certain requirements that must be met before a candidate is eligible for the benefits.

Legislative History

The legislative history cited by Petitioners misleads the court in several respects. The goals of the task force and the purported subsequent goals of the legislation cited by Petitioners are taken from testimony given at a time when the bills did not contain the independent expenditure provisions in question. The independent expenditure provisions were added by amendment at a later date, but were not included in the bill as originally passed. The Governor of Minnesota vetoed the original bill and stated that he would only sign the legislation if it contained the independent expenditure provisions challenged here.

The legislative history record is extensive in this case. In sum, the appropriate history reveals that the chief author of the bill in the senate was well aware that the provisions would result in the chilling of independent expenditures. Further, the record in this case is unrefuted that this intended effect became

reality as it pertains to Respondents. Until the restrictions were lifted by the Eighth Circuit, Respondents refrained from independently speaking through independent expenditures in the elections held to that date.

Petitioners' description of who is eligible and how the candidate becomes eligible is similarly misleading. Initially, Petitioners correctly inform the Court that "the public subsidy provision of subdivision 13(c) applies only if the opposed candidate is bound by the spending limits, is eligible to receive a public subsidy, and has raised twice the minimum match required by Minn. Stat. § 10A.323." Pet. Brief at 11. Petitioners then go on to profess that the Eighth Circuit erred in stating that the independent expenditure provisions appear to be incapable of being carried out in either the primary or general election. However, it was Petitioners who took the position before the Eighth Circuit that the provisions could not be in effect for the primary elections because a candidate must win the primary to be eligible for a public subsidy. The Eighth Circuit then correctly concluded that should Petitioners' view be correct, a candidate would also be ineligible for an independent expenditure subsidy in the general election (because the candidate had to obtain a certain percentage of the votes in order to be eligible for a subsidy in the general election).

Decision of the Eighth Circuit

The Eighth Circuit found the independent expenditure provisions violate the First Amendment on its face. In its analysis, the Court held that the scheme directly impaired the free speech rights of Respondents.

> Thus the individual or group intending to contribute to her defeat becomes directly responsible for adding to her campaign coffers. To the extent that a

> candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

Pet. App. at A8.

The Court's review of the case record disclosed the unrefuted fact that the statutes had caused Respondents to refrain from speaking in the first place and that the legislative history established this result as the intention of the legislation as well. The Court held that under these facts, the public subsidy and increased spending limits were "a direct result of that independent expenditure", and that it "chills the free exercise of that protected speech." Id. at A9.

The Court also held that the highest level of judicial scrutiny would be applied to the statutes because they are not content-neutral. Id. at A10.

Finally, the Court passed on the issue of whether Petitioners' proffered compelling interest was sufficient to overcome the free speech interest. It held that the facts of this case lead to the conclusion that Petitioners had no legitimate interest in enacting the legislation in question. The Court pointed to the record, which established that participation in public financing was near 100% before the enactments and that Petitioners had not established the need for the remedial legislation. The Court concluded that "[o]ne hardly could be faulted for concluding that this 'compelling' state interest was contrived for purposes of this litigation." Id. at A12.

SUMMARY OF ARGUMENTS

The Court should not accept this case for review for the following reasons:

1. This case is of limited value to the nation because the decision of the Eighth Circuit Court of Appeals turns only on the unique facts of the case. Petitioners' proffered compelling governmental interest here is "the maintenance of a high participation rate in the public campaign financing statutory scheme [which] is directly related to the State's compelling interest in preventing corruption or the appearance of corruption." Pet. Brief at 27. The Eighth Circuit did not decide whether this interest was sufficiently compelling because "with candidate participation in public campaign financing nearing 100% before enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate." Pet. App. at A11 (emphasis in original). Thus, the case turns on its unique facts and will be of little value to other jurisdictions.

2. The second unique aspect of this case concerns the legislative history of the enactments. The Court noted that the Chair "of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures." Id. at n. 4. This legislative history is unique to this case and is unlikely to be relevant in another case.

3. The decision of the Eighth Circuit is consistent with past decisions of this Court and other appellate Courts. The decision is consistent with the long line of cases under the unconstitutional conditions doctrine. The statutory scheme in question conditions the expenditure of public funds on whether or not a citizen exercises First Amendment rights,

thereby imposing an unconstitutional condition on that exercise.

The Court found that the record established that the scheme chilled the free exercise of speech. This Court determined in Buckley v. Valeo, 424 U.S. 1 (1976) that political speech in the form of independent expenditures is to be afforded the broadest protection under the First Amendment and that there is no compelling interest that would justify such a chilling.

The present decision correctly holds that the scheme in question had the purpose and effect of deterring speech. This deterrent effect infringes the exercise of free speech under Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986).

Finally, the Eighth Circuit held that the facts of this case lead to the inescapable conclusion that the professed interest in inducing candidates to opt into public financing was not legitimate. It did not decide whether the interest, in the abstract, would be sufficiently compelling.

Petitioners' basis for asking the Court to exercise its plenary powers rests on their belief that the decision of the Eighth Circuit is incorrect. They cannot, and did not, point to a conflict with a decision of this Court or any other appellate court on the same matter. To the extent that this is a case of first impression, the case largely turns on the unique factual background of the circumstances in Minnesota and would be of little value to the rest of the nation.

REASONS TO DENY REVIEW

The Holding of the Eighth Circuit is Fact-specific.

Petitioners rely heavily in their petition on the compelling nature of the State's interest in enacting the statutes at issue. The Eighth Circuit specifically did not decide this issue in its decision. "[W]e hold that, with candidate participation in public campaign financing nearing 100% before enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate." Pet. App. at A11 (emphasis in original). The Court's rationale for its decision is grounded on the principle that the government, in order to sustain a compelling interest in remedial legislation, must have a basis in fact or some historical basis. In this case, the record unequivocally shows that candidate participation in public financing was near 100% and that there was no showing by the state that the professed interest was real or legitimate.

The Court further noted:

> [T]o the extent that the state's brief can be read as arguing that the level of candidate participation in publicly financed campaigns may be eroded in the absence of these limitations on the speech and association rights of those who wish to make independent expenditures, the argument lacks factual support and must be regarded as wholly speculative.

Id. at A12, n. 6.

The discussion of this factual background constitutes a lengthy portion of the decision of the Eighth Circuit. Finally, citing the factual background, the Court concluded that the record in this case would not even satisfy even the most cursory scrutiny. This unique fact basis for the decision

militates against this Court granting plenary review because it would not be applicable to other jurisdictions.

The Unique Legislative History of This Case Diminishes its Use in Other Jurisdictions

This case is factually unique in another significant way. The legislative history of the enactments clearly shows that the intention of the statutes was to prevent the making of independent expenditures in the first place. The legislative history record in this case is long, complete, and unwavering. The purpose of this legislation was to deter citizens from speaking and the authors of the legislation intended it to have that effect.

Citing the full legislative history on these enactments would take an entire volume. Suffice it to say that it clearly shows that the authors of the statutes intended them to deter speech makers from speaking at all. As a representative example, the chief author of the legislation responded to a concern from another Senator over the use public money for this purpose when it could be used for better purposes, such as public education, by stating that money would not be wasted because citizens or groups of citizens would respond to this legislation by not making more independent speeches about candidates:

> * * * if I have a more powerful arsenal, namely money, handed to me to counter what that independent expenditure is going to be, the people making the independent expenditure are going to say forget it, I'm not going to try because I'm going to be out-gunned right away. And you're saying well, let's just forget about that part. They're going to just decide to do this without looking at what the other side is going to do. The other side has full

opportunity to respond to that. And that's why they're not going to do it.

Hearing on H.F. 163, Sen. Comm. on Finance (April 17, 1993) (Excerpt taken from transcriptions in record below).

The original bill that passed the legislature did not contain the independent expenditure provisions challenged here. The Governor vetoed the bill and declared that he would not sign any bill unless it contained the independent expenditure provisions. In special session, the legislature finally passed the law with the provisions in question.

Petitioners are incorrect in their citation of legislative intent. They cited citizen members of a task force on campaign finance reform. Under well settled principles of Minnesota law, the only comments that are relevant and afforded weight in evincing legislative intent are the comments of the author of the bill. See Handle With Care, Inc. v. Department of Human Services, 406 N.W.2d 518 (Minn. 1987); McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989). This rule is followed by the federal courts when evincing Congressional intent as well. See Woodworking Manufacturers Ass'n v. National Labor Relations Board, 386 U.S. 612, 640 (1967); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

The relevant portions of the legislative history clearly indicate that the chief author of the bill intended this statutory scheme to chill the exercise of free speech rights of certain citizens. This legislative history is unique to the circumstances of the facts of this case, would have little significance to circumstances elsewhere, and argues against this Court granting plenary review.

The Decision of the Eighth Circuit is Consistent with Past Decisions of the Supreme Court and Other Appellate Courts.

The decision is consistent with the unconstitutional conditions doctrine.

Petitioners misstate the issue when they ask the Court to review this case because it is inconsistent with other decisions of this Court and others "concerning the issue of whether laws that confer benefits on one person violate another person's free speech rights." Pet. Brief at 17. That is not at issue in this case.

This statutory scheme confers benefits or burdens on a citizen conditioned on whether the citizen exercises her right to free speech. Therefore, the scheme directly contravenes the long line of cases establishing the unconstitutional conditions doctrine. The decision of the Eighth Circuit is entirely consistent with this legal doctrine.

This Court first established this doctrine in Speiser v. Randall, 357 U.S. 513 (1958), in which it invalidated a statute that conditioned a property tax exemption on the taking of a loyalty oath. This doctrine is especially important in the area of First Amendment rights. In a later case, this Court determined that the government "may not deny a benefit to a person on a basis that infringes * * * constitutionally protected interests-especially * * * freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). Finally, this doctrine is grounded on the Court's belief that it does not want to "allow the government to 'produce a result which [it] could not command directly.'" Id. at 597, quoting Speiser, 357 U.S. at 526.

Petitioners miss the point when they state that the Court of Appeals ruled that laws that confer benefits on one person violate another person's free speech rights. The real issue is

whether laws that confer benefits or burdens on someone are conditioned on the exercise of a person's free speech rights. Seen in that proper light, the decision of the Eighth Circuit is entirely consistent with past decisions of this Court and other circuits.

The Eighth Circuit decision is consistent with past decisions of this Court regarding independent expenditures.

This Court has held that independent expenditures are pure political speech which are to be afforded the "broadest protection" and that they are in "an area of the most fundamental First Amendment activities." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam). The Eighth Circuit had little difficulty in determining that the statutory scheme burdened free speech. "It is equally clear that [the statutory scheme] infringes on that protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure." Pet. App. at A9. The Court relied upon the record and the legislative history as evidence of the chilling effect and intention.

Contrary to Petitioners' assertion , this Court has found "that the government violates someone's free speech rights by assisting another in responding to that speech." Pet. Brief at 23. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court invalidated a Florida statute that required newspapers to provide space for candidates to reply to negative editorials. It found the scheme imposed a penalty on the newspaper for its speech and also held that it unconstitutionally blunted public debate by potentially deterring the newspaper from speaking in the first place.

In Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986), this Court relied on Miami

Herald to invalidate an attempt to force the utility to distribute its opponents' literature along with its own billing materials. The Court found the regulation unconstitutional because, like the statute invalidated in Miami Herald, its "effect was to deter [speakers] from speaking out in the first instance." Pacific Gas & Electric, 475 U.S. at 10.

Thus, Petitioners' assertion that the statutory scheme in question does not limit the right of citizens to speak misses the point. As this Court noted in Miami Herald, the "argument that the Florida statute does not amount to a restriction of appellant's right to speak because the 'statute in question here has not prevented the *Miami Herald* from saying anything it wished' begs the core question." Miami Herald, 418 U.S. at 256 (footnote omitted).

Petitioners have not offered a sufficiently compelling governmental interest.

This Court in Buckley discussed three possible governmental interests that might justify a chilling of free speech.

1. Preventing corruption or the appearance of corruption.

2. Muting the voices of affluent groups or individuals and thereby equalizing the ability of persons to speak and affect the outcome of an election.

3. Halting the mushrooming costs of election campaigns and thereby allowing more candidates the opportunity to run or election. See Buckley, 424 U.S. at 25-26.

This Court held that the second and third interests were not sufficient to overcome constitutional objections. Further, the first interest was not sufficient to overcome burdening free speech in the form of independent expenditures, because independent speech is not tainted by the same notions of corruption as are direct contributions. Id. at 47. Petitioners'

professed interest in inducing candidates to opt into public financing is nothing more than a reiterated refinement of the interests found unworthy in Buckley.

Moreover, as noted earlier, the Eighth Circuit deliberately did not decide whether this professed interest was sufficiently compelling. It held that the government's interest in this case was not legitimate because of the facts in this record. It held that the record showed that there was no need for the government to add inducements for candidates to opt into public financing because candidate participation was near 100%.

Finally, the statute must not only serve a compelling governmental interest, it must be narrowly tailored to meet that interest. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665 (1990). The Eighth Circuit did not have to reach this matter because it held that the interest was not legitimate. However, this Court should note that Petitioners will fail on the other prong as well. There is nothing in the statute that requires the candidate who receives the money subsidy to spend it on "countering" the citizen speech. Thus, not only is the statute not narrowly tailored, it belies Petitioners' assertion that it is needed to further public debate or to induce candidates to opt into public financing.

Petitioners' reasons for granting certiorari are not sound.

At base, Petitioners are asking the Supreme Court to grant plenary review simply because they disagree with the decision of the Eighth Circuit. Disagreement with a decision is not a proper basis to seek review on Writ of Certiorari under Rule 10 of the Supreme Court Rules. For instance, Petitioners have not, and cannot, articulate where the decision is in conflict with a decision of this Court or any other appellate court on the same matter. To the extent that this matter is a unique case, it is unique because of its record,

including the legislative history and the record of candidate participation in public financing in Minnesota.

The only importance that Petitioners have placed on this case is its potential use regarding bills that might possibly pass the United States Congress at some future date. In this regard, Petitioners are asking the Court to hear this case to provide prospective relief so that the legislative branch of government could be guided in its future conduct. Respondents submit that this is also an improper reason for granting certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for a writ of certiorari in this matter.

Respectfully submitted,

Harley M. Ogata
Counsel of Record

Minnesota Education Association
41 Sherburne Avenue
St. Paul, MN 55103
(612) 227-9541

Eric R. Miller
Oppenheimer, Wolf & Donnelly
1700 First National Bank Building
St. Paul, MN 55101
(612) 223-2500

Counsel for Respondents